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16 UNITED STATES DISTRICT COURT
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18 NORTHERN DISTRICT OF CALIFORNIA
19
20 OAKLAND DIVISION

21 In re BIGBAND NETWORKS, INC.)
22 SECURITIES LITIGATION)

Master File No. 07-cv-05101-SBA

23) CLASS ACTION

24) [PROPOSED] ORDER DENYING
25) PLAINTIFF'S MOTION TO REMAND

26 This Document Relates to:)

27 ALL ACTIONS.)

DATE: April 8, 2008

TIME: 1:00 p.m.

JUDGE: The Honorable Sandra
Brown Armstrong

1 Before the Court is plaintiff James Wiltjer's motion to remand his action (titled *Wiltjer v.*
 2 *BigBand Networks, Inc., et al.*, Case No. 04:08-cv-000022-SBA) to San Francisco Superior
 3 Court [Docket No. 55]. Defendants timely opposed the motion. Having read and considered the
 4 arguments presented by the parties in the papers submitted to the Court, and having heard and
 5 considered oral argument before the Court on April 8, 2008, the Court hereby finds as follows:

6 BACKGROUND

7 Plaintiff James Wiltjer ("Wiltjer") filed a securities class action in state court alleging
 8 claims under the federal Securities Act of 1933 ("Securities Act"). Wiltjer's claims are virtually
 9 identical to those asserted in seven other consolidated putative class actions that were filed in and
 10 are proceeding before this Court. Each of those other class actions alleges that defendants
 11 violated federal securities laws by issuing allegedly false and misleading statements in
 12 connection with defendant BigBand Network, Inc.'s March 2007 initial public offering ("IPO").
 13 On January 2, 2008, the defendants removed Wiltjer's action to this Court pursuant to 28 U.S.C.
 14 § 1441 and the removal provisions of the Securities Litigation Uniform Standards Act of 1998
 15 ("SLUSA") [*Wiltjer* Docket No. 1]. Wiltjer's action was thereafter deemed related to the first-
 16 filed of the seven other similar class actions, reassigned to this Court and consolidated along with
 17 the seven other class actions [Docket Nos. 52, 53, 54].

18 Plaintiff filed his Motion to Remand on February 19, 2008 [Docket No. 55]. Plaintiff
 19 contends that he properly filed his complaint in state court and that removal was improper.

20 LEGAL STANDARD

21 Congress enacted SLUSA with two goals in mind: *First*, Congress sought to prevent
 22 plaintiffs from circumventing the requirements of the Private Securities Litigation Reform Act of
 23 1995 (the "Reform Act") by filing class actions asserting state law claims. *See, e.g.*, S. REP. NO.
 24 105-182 at 1 (1998) (SLUSA was designed to "limit the conduct of securities class actions under
 25 State law"). *Second*, Congress intended to eliminate the abusive practice of plaintiffs filing
 26 securities class actions in state courts rather than federal courts in order to circumvent the
 27 Reform Act's protections. *See, e.g.*, H.R. CONF. REP. NO. 105-803, at 13 ("The purpose of
 28 [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides

1 against abusive litigation by filing suit in State, rather than Federal, court.”); H.R. REP. NO. 105-
2 640, at 8-9 (same).

3 Prior to SLUSA, the Securities Act provided that claims under the Securities Act could
4 not be removed from state court. 15 U.S.C. § 77v(a) (1994). SLUSA, however, made a number
5 of changes to the Securities Act. *First*, SLUSA amended the first sentence of § 77v(a) to provide
6 exclusive federal jurisdiction over “covered class actions” asserting Securities Act claims.¹ 15
7 U.S.C. § 77v(a). This change eliminated state courts’ concurrent jurisdiction over such claims.
8 *Id.* *Second*, SLUSA amended the second to last sentence of § 77v(a) to eliminate the former bar
9 to removal of certain actions arising under the Securities Act. *Id.* Specifically, SLUSA added
10 the italicized phrase to the following sentence in § 77v(a):

11 *Except as provided in section 77p(c) of this title, no case arising under this*
12 *subchapter and brought in any State court of competent jurisdiction shall be*
removed to any court of the United States.

13 15 U.S.C. § 77v(a) (emphasis showing amendments).

14 *Third*, SLUSA added a new § 77p. The new Section 77p(c) specifically authorizes the
15 removal of covered class actions as follows:

16 Any covered class action brought in any State court involving a covered security,
17 as set forth in subsection (b), shall be removable to the Federal district court for
the district in which the action is pending, and shall be subject to subsection (b).

18 15 U.S.C. § 77p(c). The new Section 77p(b) provides that certain class actions are precluded:

19 No covered class action based upon the statutory or common law of any State or
20 subdivision thereof may be maintained in any State or Federal court by any
private party alleging --

21 (1) an untrue statement or omission of a material fact in connection with
22 the purchase or sale of a covered security; or

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27 ¹ A “covered class action” is any lawsuit in which (a) damages are sought on behalf of at
28 least 50 prospective class members, or by a named part on a representative basis on behalf of
unnamed parties; and (2) common questions of law or fact predominate over questions affecting
only individual prospective class members. 15 U.S.C. § 77p(f)(2).

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b).

ANALYSIS

Removal of this action is proper under 28 U.S.C. § 1441(b). Wiltjer's action is a covered class action under SLUSA because Wiltjer purports to act as a named representative seeking damages on behalf of himself and unnamed persons, and questions of law or fact common to those persons predominate. *See* 15 U.S.C. § 77p(f)(2); Wiltjer Complaint at ¶¶ 1, 31-36 [Wiltjer Docket No.1]. Wiltjer's action asserts federal Securities Act claims. Wiltjer Complaint at ¶¶ 1, 31-36 [Wiltjer Docket No.1] ¶¶ 1, 8, 58, 62, 69, 71. SLUSA's amendment to 15 U.S.C. § 77v(a) gave federal courts exclusive jurisdiction over covered class actions alleging Securities Act claims. *See Rovner v. Vonage Holdings Corp.*, 2007 WL 446658, at *3 (D.N.J. Feb. 7, 2007); *accord Rubin v. Pixelplus Co., Ltd.*, 2007 WL 778485, at *5 (E.D.N.Y. Mar. 13, 2007). Accordingly, removal of this action is proper under 28 U.S.C. § 1441(b), which provides for removal where district courts have original jurisdiction.

Removal of this case is also proper under SLUSA's removal provisions in the second to last sentence of § 77v(a) and in § 77p(c). Read together, those provisions make clear that claims "arising under" the Securities Act may be removed to federal court. This interpretation gives full effect to the second to last sentence of § 77v(a). *See* 15 U.S.C. § 77v(a) ("Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.") (emphasis added); *see also Rovner*, 2007 WL 446658, at *4; *accord Rubin*, 2007 WL 778485, at *3; *accord Brody v. Homestore*, 240 F. Supp. 2d 1122, 1124 (C.D. Cal. 2003).

This interpretation is also the only interpretation that is consistent with SLUSA's legislative history and intent. *See, e.g., Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir.), *amended*, 320 F.3d 905 (9th Cir. 2003); *Patenaude v. Equitable Life Assurance Soc'y of the United States*, 290 F.3d 1020, 1025 (9th Cir. 2002) ("SLUSA mandated that federal court be

1 'the exclusive venue for class actions alleging fraud in the sale of certain covered securities' and
2 that 'such class actions be governed exclusively by federal law.'") (citation omitted).

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiff James Wiltjer's Motion to Remand is DENIED.

5 IT IS SO ORDERED.

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7 Dated: _____

8 HON. SAUNDRA BROWN ARMSTRONG
9 UNITED STATES DISTRICT JUDGE
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